

**Dillon Stores, a Division of Dillon Companies, Inc.,
and United Food and Commercial Workers
Union, Local 322, AFL-CIO-CLC. Case 17-
CA-16811**

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On April 29, 1994, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dillon Stores, a Division of Dillon Companies, Inc., Wichita, Newton, and Wellington, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹In adopting the judge's finding that issues discussed at Associates' Committee meetings included matters directly related to terms and conditions of employees' employment, we find it unnecessary to pass on the judge's further finding that certain other topics discussed at those meetings did not.

²Chairman Gould agrees with his colleagues that the Associates' Committee is a labor organization and that the Respondent violated Sec. 8(a)(2) and (1) of the Act by dominating and interfering with, and contributing support to, that labor organization. He notes that the control exercised by the Respondent over the committee is such that the freedom of choice and independence of action open to employees is too strictly confined within parameters of the Respondent's making for the committee to be a genuine expression of democracy in the workplace. *Keeler Brass Co.*, 317 NLRB 1110 (1995) (Chairman Gould's concurrence). Further, the committee engaged in a pattern or practice of dealing with the Respondent on employment conditions.

³The General Counsel excepts to the judge's recommended remedy and Order, arguing that it improperly fails to extend to all 15 of the Respondent's Wichita, Kansas retail stores, as well as those stores located in Newton and Wellington, Kansas. We do not read the judge's proposed remedy and Order as narrowly as does the General Counsel. Rather, as the judge found that the Associates' Committee was unlawful, and that the committee operated in all of the Respondent's Wichita, Newton, and Wellington stores, we interpret his remedy and proposed Order as extending to all stores in these cities where the committee functioned. In any event, we agree with the General Counsel and find that this relief is appropriate in this case.

Stanley B. Williams, Esq., for the General Counsel.

319 NLRB No. 149

William G. Haynes, Esq., of Topeka, Kansas, for the Respondent.

Peter V. Marks, Sr., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act was tried before me in Wichita, Kansas, on December 1-2, 1993.¹ On June 23, the unfair labor practice charge in Case 17-CA-16811 was filed against Dillon Stores, a Division of Dillon Companies, Inc. (the Respondent) by United Food and Commercial Workers Union, Local 322, AFL-CIO-CLC (the Union). On September 28, the General Counsel of the National Labor Relations Board issued a complaint alleging violations of Section 8(a)(2) and (1) of the Act by Respondent. More particularly, the complaint alleges the existence of an "In-Store Representative Program," which it names as a party in interest to this proceeding; it alleges that the In-Store Representative Program is a labor organization within the definition of Section 2(5); and it alleges that Respondent has dominated and interfered with the operation and administration of, and has been rendering unlawful assistance and support to, the In-Store Representative Program at Respondent's retail grocery stores in Wichita, Newton, and Wellington, Kansas. Respondent duly filed an answer admitting jurisdiction of the Board, and admitting the status of certain individuals as supervisors within Section 2(11) of the Act, but denying the commission of any unfair labor practices.

On the entire record and my observation of the demeanor of the witnesses, and after considering the briefs that have been filed, I make the following²

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation whose principal office is in Hutchinson, Kansas, operates retail grocery stores throughout Kansas. Annually, Respondent derives gross revenues in excess of \$500,000, and it purchases and receives at its Kansas facilities goods valued in excess of \$50,000 directly from suppliers located at points outside Kansas. Therefore, as it admits, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Each of Respondent's stores has a manager; each manager reports to a district manager. The district managers report to Respondent's executive director, David Barnheizer. Robert Lee Graber is Respondent's district manager for its stores in

¹All dates are in 1993 unless otherwise indicated.

²Passages of the transcript have been electronically reproduced. Proper punctuation of transcript quotations is supplied only when necessary to avoid confusion. When I quote exhibits, I make minor grammatical corrections rather than use "[sic]."

Newton, Emporia, Mulvane, Derby, Eldorado, Augusta, Winfield, Wellington, and Arkansas City. Howard Joe Koelliker is Respondent's district manager for its 15 Wichita-area stores; Neil J. Schumacher is Koelliker's assistant.

Graber testified that there exists in each of the Newton and Wellington stores an "employees' committee." Graber testified that such committees have been in existence for about 7 years, but there are no documents that explain their purposes or functions.

Employees become members of the committees in a procedure that is generally described by a notice of election that was distributed by Respondent's personnel department in Hutchinson; I quote the notice in full as it also gives some description of the committees' operations:³

TO ALL DILLON STORE RETAIL ASSOCIATES:

It is time to elect the Associates' Committee members for the 1993-94 year. As in the past, people serving on the committees will serve voluntarily. Each store's committee will be comprised of one full-time associate and one part-time associate. In towns where we have only one store, the committee will be made up of two full-time associates and one part-time associate. We encourage all departments to participate. The committee will meet once each quarter, or as needed, to be determined by the committee and the District Manager.

After the meeting with management personnel, a followup report of items discussed and answers to questions covered by the committees will be posted on each store's bulletin board. This report will also be discussed at the next scheduled weekly store meeting. The scheduling of the quarterly meetings will be coordinated by the District Manager.

The elected members will serve for one year. If there is a vacancy during the year, the person receiving the highest votes will be named to serve the rest of the term. *BE SURE TO NOTIFY YOUR DISTRICT MANAGER IMMEDIATELY IF THERE ARE ANY CHANGES IN COMMITTEE MEMBERS*, due to members needing to be replaced on the committee.

Anyone from any department in the store who would like to serve as a committee member, as well as those people who have served this past year, are certainly welcome to sign up for this year's election. Please sign below and the election will be held on *FRIDAY, JUNE 25, 1993*.

Ballots will be sent to each store in the mailbag on Monday, June 21, 1993.

We feel with the advance notice of the election, you will be able to arrange for everyone to sign up ahead of time.

DAN NACCARATO
PERSONNEL DEPARTMENT
June 14, 1993

Then follow in the notice two columns, one each for signatures of full-time and part-time employees who are volunteering to be a candidates in the forthcoming elections that Respondent has ordered. Witnesses testified that, when no one

signs up, managers ask certain employees if they "would mind" having their names placed on Respondent's ballots.

According to the above-quoted notice of elections, the name of the "employees' committee," as Graber called it (or the "In-store Representative Program," as the complaint calls it) is "Associates' Committee," and I shall refer to it as such.

Graber and Koelliker testified that they conduct quarterly meetings of Associates' Committees at each store (or group of stores in the case of Wichita and Newton). At each such meeting they give management's responses to questions and comments from the employee members of the Associates' Committee if they know what to respond at the time. If they do not know answers, Graber and Koelliker confer with store managers, or Barnheizer, or the payroll office, or whoever can provide the answer. Then all responses are transcribed in the followup reports, as described by the election notice. The followup reports (reports) are reviewed by Barnheizer; then they are posted in each store.

The report of Graber's September 22 meeting with the Associates' Committees of the Newton stores will be quoted at length because it is most typical of the many such reports that were received in evidence; reports of other meetings will receive substantial summarization when they are discussed.⁴ In my estimation, three of the employees' questions that are contained in the report have no apparent, significant relationship to the terms and conditions of the employees; those are questions 4, 9, and 12. The remainder of the questions do have such a relationship:

1. ARE WE GOING TO GET NEW SCANNERS?

ANSWER: Yes, all stores are scheduled to get new scanning equipment. 2. CAN WE DO ANYTHING ABOUT THE PRICE MOLDING ON THE COFFIN CASES [deep frozen-food display cases]? ANSWER: The price molding that we presently have is the best we can do. 3. IS ANYTHING BEING DONE ABOUT OUR PILFERAGE PROBLEM? ANSWER: At the present time we have hired security to help with this problem. 4. DO WE HAVE TO GIVE SERVICE TO CUSTOMERS THAT DON'T WEAR SHOES OR A SHIRT IN THE STORES? ANSWER: Yes, we don't have a policy that prohibits customers from entering our stores without shoes or shirts. 5. ARE WE SUPPOSED TO HAVE ALL ELECTRICAL BREAKERS LABELED? ANSWER: Yes, all breakers should be labeled. At the present time we are getting this accomplished in the stores. 6. WHAT IS THE DIFFERENCE BETWEEN ASSISTANT MANAGERS AND MANAGEMENT TRAINEES? ANSWER: The management training program is designed to provide us with future store managers and other management positions in our company. The associates selected for this program are assigned either to assistant manager positions or management training. . . . Selection is a judgment decision. 7. WHAT FACTORS ARE USED TO DETERMINE IF AN ASSOCIATE IS PROMOTABLE? ANSWER: A number of factors are considered such as atti-

³ Capitalization and italics are original.

⁴ Capitalization and italics are original; however, in the originals, the paired questions (or comments) and responses were well-spaced for reading while posted, not condensed into this single-paragraph form.

tude, desire, dependability, people skills . . . consistency, etc. Dillons promotes from within whenever possible promotions go to the most qualified candidates. 8. DO WE HAVE A DIFFERENT DRESS CODE? *ANSWER:* No, the present dress code has been in effect for some time. 9. DO WE USE CAMERAS FOR SHOP-LIFTING PURPOSES? *ANSWER:* As a general rule we do not use cameras to control shoplifting, but they have been used in certain cases. 10. DO WE KNOW ANYTHING ABOUT OUR NEW INSURANCE PROGRAM? *ANSWER:* At the present time all the details have not been worked out, but information will be shared as soon as it is available. 11. WHO EVALUATES [non-supervisory] DEPARTMENT MANAGERS? *ANSWER:* Department managers are evaluated by the store managers [who] at times ask for assistance from department supervisors. 12. WHAT CAN WE DO ABOUT CUSTOMERS THAT USE THEIR FINGERS TO SAMPLE AT THE SALAD BAR? *ANSWER:* We should tell them that we would be happy to sample anything at the salad bar and that we have plastic forks and spoons for this purpose. If this does not solve the problem, report this to your store managers so they can handle the situation. 13. WILL THE COMPANY PROVIDE ANYTHING TO HELP CONTAIN HEALTH CARE COSTS SUCH AS PROVIDE A GYM FOR ASSOCIATES TO USE TO EXERCISE? *ANSWER:* At the present time we do not have any plans to provide this type of benefit because it would need to be made available on a fair, consistent basis in all the towns we operate in around the State. *FOR CONSIDERATION:* Install a video drop box outside the store on the parking lot. *NEXT MEETING:* December 8, 1993, Store #6 [Newton], 2 p.m.

Graber testify that an Associates' Committee member raised the question about the coffin cases, and the moldings that hold price tags inside the coffin cases, because the tags "were difficult to administer." Graber testified, "They just wanted to know if there was any other method that we could use."

The report a June 9 meeting of the Associates' Committees of the Newton stores that was conducted by Graber lists three numbered employee questions. One of the questions concerns updating of a computer system, a topic that has no apparent, significant relationship with the employees' terms and conditions of employment. One of the questions asks for definition of current policy on transfers by part-time employees, and the third is:

3. CAN ANYTHING BE DONE TO IMPROVE THE AIR CONDITIONING THE FRONT END AREA AT STORE #24? *ANSWER:* We will check to see what can be done to correct this problem.

Graber testified that management conducted a "follow up" on this question:

We made sure that all the equipment was operating properly, the filters were properly cleaned, that the system was in fact working. We've done [all] we can so far, without adding additional air conditioning.

The report of a May 25 meeting of the Associates' Committee of the Wellington store that was conducted by Graber lists eight numbered employee questions and comments. One of these concerns a topic that has no apparent, significant relationship to the employees' terms and conditions of employment, whether the store would donate day-old bread to charity. Other questions and answers are about: tornado warning procedures, content of periodic evaluations, when a raise can be expected, whether Respondent hires handicapped employees, and whether the store hours would (again) be extended during the wheat-harvest season. Also, specific questions and responses include:

4. THE SMOKING LOUNGE IS NOT AS COMFORTABLE AS THE REGULAR LOUNGE. CAN ANYTHING BE DONE ABOUT IT? *ANSWER:* We are going to purchase a new table for the smoking lounge. We will evaluate this situation to see if anything else can be done to make the lounge more comfortable. 8. CAN WE HAVE PLASTIC BAG HOLDERS ON TOP OF THE CHECK STANDS? *ANSWER:* Yes, the bag holders are available. We will try some on a few check stands.

Graber testified that the table was, in fact, purchased. About question eight, Graber was asked and he testified:

Q. Does the location of those plastic bag holders have anything to do with the performance of the job?

A. I think that it is the individual preference to the sacker. Some like to have it low. Some like to have it a little higher, probably depending on how tall they are. . . . I think what they really wanted was a test to see which one is the best for them.

Height-adjusting bag clips were provided for the sackers.

The report of an August 19 meeting of the Associates' Committee of the Wellington store that was conducted by Graber lists five numbered employee questions and answers; they concern whether store managers can determine when an employee takes his vacation, when raises accompany promotions, whether training time is included in computing overtime, whether Respondent hires handicapped employees, and whether video department managers must be full time. Listed at the conclusion of the report "For Consideration" is: "Install a pop machine, microwave, phone and intercom in the smokers' area." General Counsel's witness Galen Green testified about the smokers:

At this time, they were also asking for a pop machine and a microwave, and I think a time clock, or some sort of clock, back there, as well as a table, something to make it more comfortable for them.

Green testified that Graber replied that Respondent did not wish to spend a lot of money on the smoking area, but he would see what could be done; after the requests, a new table and clock were placed in the store's smoking area.

One of the questions at the August 19 meeting was "IF SOMEONE ONLY WANTS TO TAKE THREE DAYS OF VACATION, CAN THE MANAGER SEND IN SEVEN DAYS' VACATION TIME FOR THE ASSOCIATE?" The response is: "ANSWER: No, the manager should send in only the time the associate requests." General Counsel's wit-

ness Richard Lewis Townsend, a former Associates' Committee member, testified that he brought this question to Graber because an employee had told him that he had been unfairly required to take a vacation day. Townsend testified that Graber's response to the Associates' Committee was: "He said, no, that should have never happened and that he would check into it and find out why it did happen."

The report of a January 25 meeting of the Associates' Committee of the Wellington store that was conducted by Graber lists seven-numbered employee questions and comments about incentive bonuses, nonsupervisory department managers' bonuses, use of full-time employees as checkers, Respondent's policy of rotating weekend work, and graduated vacation benefits. Also, specific questions, or assertions, and replies included in the report are:

1. WE NEED EXTRA HELP ON THE STOCK CREW ON WEEKENDS. *ANSWER:* We will evaluate our work schedule and grocery orders for the weekends. If we see a need to add help, we will do so. 2. CAN WE GET RID OF THE J-HOOKS? *ANSWER:* No, our J-hook program increases our sales and profits without taking extra space. Listed as "*FOR CONSIDERATION*" were: "Company to help sponsor a softball team. Consider another power jack [lifting equipment] for the stock crew."

Graber testified, "A J-hook is a device that we hook onto our shelving molding, and we put merchandise on it." Graber was further asked, and he testified:

Q. And do you remember why they raised that issue of whether they could get rid of that?

A. Sometimes they're difficult to stock around them.

Q. And that was the concern that was expressed to you?

A. I assume that.

About the power jacks, Graber was asked, and he testified:

Q. And do you have any specific recollection at this point, Mr. Graber, of what was talked about with respect to the power jack?

A. Not other than the fact that they [the stock crew] felt that they needed more than they had.

Graber testified that he did not know if the additional power jack had been supplied.

The report of a February 16 meeting of the Associates' Committees of the Wichita stores that was conducted by Koelliker and Schumacher lists 23-numbered employee questions and comments. Two of these concern topics that have no apparent, significant relationship to the employees' terms and conditions of employment: installation of a VISA terminal and establishment of a new express lane. Additional questions or comments listed in the report: asked if an existing bonus program was going to be continued; asked, "WILL THERE BE A COST OF LIVING WAGE INCREASE?"; asked for explanation of the existing transfer policy; asked if a new dress code was being instituted; asked why some, but not all, employees were required to work Sundays without a pay premium; stated that "ASSOCIATES WOULD LIKE TO HAVE" additional information listed on their pay checks; asked why employees are not notified of

crimes that have been committed on premises; asserted, "THE STOCK CREW DOES NOT LIKE OUR NEW BOX KNIVES"; asked when the Company will go to a total non-smoking policy; asked, "WOULD IT BE POSSIBLE TO" make a change in sick-pay policy; asked why sick-pay benefits for Sundays are different for some employees; asked why so many stock counts are required; asked for a different type cart to use in helping customers get to their cars; asked for another type of cart to use in sorting stock; asserted, "BREAK ROOM LOUNGES ARE NOT BEING TAKEN CARE OF THROUGHOUT THE DAY"; stated that the employees "WOULD LIKE TO HAVE" a credit union office in Wichita (as well as Hutchinson); stated that some individual or individuals "WOULD LIKE TO HAVE" cart corrals installed in the parking lot of one Wichita store; asked what the Company was doing to prevent carpal tunnel syndrome; asked if there was a policy of granting employees 2 full weekends off per quarter; asked "WOULD IT BE POSSIBLE TO" augment the bonus program on factors of individual merit; and asked "WILL THE COMPANY BE GETTING INTO PROVIDING DAY CARE SERVICE?"

Most of the replies were statements of what current policy was; sometimes those replies added statements that no change was contemplated. The answer to the request for more paycheck information included a reply that change was not possible with current software, but that the payroll department "will keep this in mind when they upgrade or change the package" The reply to the smoking-policy question included: "We will be going store to store to develop" a new policy. The reply to the request for new stock-sorting carts was: "Will get with Larry Bonewell, Store Manager, to look into getting more carts in this store." The reply to the statement that the breakroom lounges needed additional care included: "We will cover this question with all store managers" The answer to the day-care question included: "We are seriously looking at how we could do this."

General Counsel's witness Mina Suzanne Hale is a former Associates' Committee member. Hale testified that in the February 16 meeting she raised a question about Respondent's dress code because: ". . . the male employees wanted to know why they must wear ties and why they cannot wear earrings." Hale testified that Koelliker responded, "that there was a committee that was being raised to adjust the dress code, but that at that time, there would be no changes made."

Koelliker was asked about the box-knife comment, and he testified:

Q. I take it from your answer, and from the way the question was posed in the minutes, that you viewed that as a complaint from the employees?

A. It was a concern. They didn't like the change.

Koelliker also testified that he participated in the followup to the February 16 smoking-policy question by visiting all of the Wichita stores to see what else could be done to segregate the smokers. Koelliker met with the store managers to insure compliance with a program for keeping the lounges cleaner; he also met with the managers that it was Respondent's policy that employees be scheduled for one free weekend per quarter. Koelliker testified that Barnheizer provided

the answer to the day-care question; he had not known of any prior efforts at establishing a program.

The report of Koelliker's June 16 meeting with the Associates' Committees of the Wichita stores lists 37-numbered employee questions and comments. Of these concern topics, 14 have no apparent, significant relationship to the employees' terms and conditions of employment: a "war on waste" program, plans for new stores, posting of a check-cashing limit notice for customers, failure of a film-processing contractor to credit certain store accounts, customers who do not wear a shirt or shoes, written explanations of film-processing procedures for customers, desirability of charging for cashing customer's checks, desirability of mixing perishables with other types of outgoing shipments, quality of fish received, certain warehouse errors, store reimbursement for damaged coins, running out of sale items, when customers are not to be charged anything for erroneously priced merchandise, and institution of a quality control program at one store.

The remaining numbered items in General Counsel's Exhibit 3 include: a question of how assistant store managers are selected; a statement of a need for towel dispensers in rest rooms; an assertion that a grocery department is not rotating weekend assignments; a "SUGGESTION: Include birth control pills in our co-pay"; a statement of need for removal of "unsanitary" recycling matter from a store; a question of whether the Respondent is setting up a day-care center; a question about employees' responsibility for securing replacements; a question, "COULD WE HAVE PAPER SEAT COVERS IN OUR REST ROOMS FOR SANITARY REASONS?"; a statement that one restroom needs repair; an inquiry about availability of bigger smocks for pregnant employees; a question, "COULD STORE #56 GET SAFETY GOGGLES FOR ASSOCIATES WHO USE THE FRYER IN THE BAKERY AND ASSOCIATES WHO OPERATE THE BAILER?"; a "COMMENT: Associates are happy that the company separates smokers from nonsmokers"; a question about how employees find out if a promotion is available; a question of why work-injured employees are required to see certain doctors; a question about benefits of Hutchinson-store employees; a question whether employees will be required to contribute to medical costs in the future; a question about whether full-time employees are required to work weekends; a "COMMENT: Our new safety knives have sharp edges and we have damaged clothes"; a question about employees' rights to transfer between stores; a statement that the parking lot is in bad repair and the condition can cause accidents with carts;⁵ a statement that there is a crack in a parking-lot ramp; a comment that more help is needed in correcting price-scanning problems; and a statement that "THE PROPANE BUFFER AT STORE #56 IS TOO SMELLY. WE HEAR CUSTOMER AND ASSOCIATE COMPLAINTS."

The answers to the last set of questions and comments include: "We will fix" the towel dispensers; "Management was notified and will follow up" on the weekend rotation complaint; "We will have it [the plumbing] repaired"; "Yes," goggles will be provided for fryer and bailer operators; "We are attempting to work out a solution with our landlord" to get parking lot potholes repaired; establishment of a day care center "is being reviewed"; and the propane

buffer always smells bad but, "We will check to make sure it is operation properly to keep the smell at a minimum." The Associates' Committee was also told that Respondent furnished various sizes of smocks and how employees could secure them.

Questions from the June 16 meeting that got an essential "no," or a statement of what current policy is, and an express or implied statement that things would not be changed, include the ones on: moving the "unsanitary" recycling material outside; getting replacements; paper toilet seat covers; notification of promotional opportunities; company doctors; weekend work for full-time employees; transfers; the crack in the ramp; and scanning problem help.

On cross-examination, Koelliker testified that he listed the birth control pills comment as a "COMMENT" because "that is the way that it was proposed to me, [it] is a suggestion." Koelliker testified that when the answers to the June 16 questions indicated that a followup would be conducted, the followup was, in fact, conducted.

The report of a September 28 meeting of the Associates' Committees of the Wichita stores that was conducted by Koelliker and Schumacher lists 47-numbered questions and comments. Of these concern topics that have no apparent, significant relationship to the employees' terms and conditions of employment: a question whether a franchise in the store leases its space, a question whether the video department can get a separate telephone line, a question whether a store will get an automated teller machine, a question whether a store will get a pharmacy, and a statement that the cheese is not being rotated in the warehouse. Other questions and comments included: "COULD DILLONS LOOK AT" reimbursing day-care costs; "SUNDAYS AND NIGHTS ARE NOT BEING ROTATED FAIRLY"; "COULD OUR STORE HAVE" a floor-walker to clean up spills; a statement that Respondent "IS NOT PROPERLY TRAINING EMPLOYEES"; "OUR SCHEDULE IS CHANGED" without notice; "COULD THE COMPANY LOOK AT 100% ON SICK PAY AND PAY ASSOCIATES FOR UNUSED SICK LEAVE?"; "CAN ANYTHING BE DONE" about the air conditioning; "STORE #26 WOULD LIKE THEIR OWN REST ROOM SEPARATE FROM THE CUSTOMERS FOR SAFETY"; "COULD THE ASSOCIATES IN CHARGE OF THE STORE AT NIGHT BE CONSIDERED FOR MORE PAY?"; "COULD THE STORE SCHEDULE AN EXTRA PERSON IN CASE SOMEONE CALLS IN SICK?"; "COULD WE HAVE C.P.R. TRAINING"; "COULD BETTER LIGHTING BE PUT IN . . . ?"; "COULD THE [nonsupervisory] DEPARTMENT HEADS" be more involved in evaluations?; "COULD THE COMPANY LOOK AT" giving flu shots?; and "IS THERE ANYTHING WE CAN DO" to get bale-loading help? The other questions and responses are essential duplicates of those in other reports, but one question-and-response bears quoting:

38. OUR CUSTOMER SERVICE MANAGER WILL NOT WORK WITH HIS EMPLOYEES ON TIME OFF. HE DOES NOT GIVE ANY NOTICE WHEN HE CHANGES THE SCHEDULE. ANSWER: Please advise your store manager of this situation. If it does not improve, please contact [Koelliker] or [Schumacher].

⁵ Some employees are assigned to help customers to their cars.

On cross-examination, Schumacher was asked about the above-quoted question 38 that was asked on September 28:

Q. And did you . . . discuss this with the . . . customer service manager, or the store manager, who was the subject of this question?

A. It was covered with all 15 store managers.

Q. All right. So even though this may have originated out of one store at this meeting, you made it a point to talk with the store managers that this was something that they should do?

A. As a reminder. . . . They knew the policy.

Respondent's witnesses pointed out that many of the employees' questions were answered in a policy manual, a copy of which each managers' office maintains. General Counsel's witness, Townsend, testified, however, that when he became an Associates' Committee member, he was told by Graber:

We'll meet quarterly. And you'll take the questions that you have from your suggestion box, and any other questions that people don't feel comfortable with going to the manager to solve themselves, and we'll just try to answer them.

Also, Respondent's witness Connie Warhurst, an Associates' Committee member for a time, was asked why, if questions were answered in the manual, they were brought up at the meetings. Warhurst replied: "Usually they're from other employees, and you just take them because they were brought to you. That's part of being the employee representative."

When asked if Respondent could dissolve the Associates' Committee system if it wished, Graber replied that it could.

B. Analysis and Conclusions

Section 2(5) of the Act defines a "labor organization" as follows:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 8(a)(2) provides that it shall be an unfair labor practice for an employer

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

In *Electromation, Inc.*, 309 NLRB 990 (1992), the Board conducted an extensive analysis of these sections of the Act and their legislative histories. I shall not repeat that analysis here; it suffices it to say here that Congress has found that the practices proscribed by Section 8(a)(2) constitute most effective methods for defeating employees' rights under the Act.

The Board in *Electromation, Inc.* further suggested a method of analysis for allegations such as those that are made here:

First, we inquire whether the entity that is the object of the employer's allegedly unlawful conduct satisfies the definitional elements of Section 2(5) as to (1) employee participation, (2) a purpose to deal with employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an "employee representation committee" is in some way representing the employees. Second, if the organization satisfies those criteria, we consider whether the employer has engaged in any of the three forms of conduct proscribed by Section 8(a)(2).

Therefore, the first inquiry is whether the Associates' Committee is a labor organization; the second inquiry is whether the Associates' Committee has been the object of Respondent's domination, interference, or support.

1. Existence of a labor organization

The employee members of the Associates' Committee act in the capacity of representatives of other employees. On brief, Respondent's Counsel refers to the employee members of the Associates' Committee as "the representatives." In their testimonies, Graber and Koelliker freely referred to the employee members of the Associates' Committee as "the representatives." Everytime an employee member of the Associates' Committee expressed what "we" would like as a change in "our" terms and conditions of employment, the committee member acted in a representative capacity. And when, on February 16, female employee Hale asked Koelliker why the male employees could not wear earrings, she necessarily did so in a representative capacity.

Respondent denies, however, that the element of "dealing," as that term is used by Section 2(5), was conducted by Respondent and the Associates' Committee. The Board in *E. I. DuPont & Co.*, 311 NLRB 893, 894 (1993), following *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), explained the statutory term in question:

By contrast, the concept of "dealing" does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties.¹⁰ That "bilateral mechanism" ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposal by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.

¹⁰ See *Electromation*, supra at 995 fn. 21.

In the narrative of facts, I have noted those discussions of topics covered by the Associates' Committee that did not have an apparent, significant relationship to the terms and conditions of employment of the employees. They were not so great in number that the discussions of topics that do have that relationship represent only "isolated instances."

On brief, page 45, Respondent argues that the Associates' Committee's "primary purpose [is] assisting management to communicate with the other associates employed within the store[s]." "Communications" and "dealings" are not mutually exclusive terms; some communications are dealings. Moreover, it is to be noted that in the above quote of *Electromation*, the Board used the article "a" to modify "purpose." The Associates' Committee could have had many purposes, but if one purpose of the Associates' Committee is dealing with Respondent, it is a labor organization. This is necessarily so because the statutory definition of "labor organization" includes entities whose "purpose, in whole or in part . . ." is such dealings.

The district managers did testify that the Associates' Committee existed to assist management to communicate with employees. And management did communicate with the employees through the Associates' Committee. But the communications involved the receipt of proposals and grievances, seemingly on every possible aspect of the employment relationship; and the communications involved, "by word or by deed" acceptance or rejection of those grievances or proposals. This is precisely the bilateral mechanism held to have constituted a labor organization in *Electromation*.

When an employee representative asked, "Can we do anything about the price molding on the coffin cases," he was making a proposal. The employee representative was proposing that the moldings that hold price tags be done away with, or at least changed. The proposal was not made in an effort to secure more commodious facilities for customers; it was made to improve the terms and conditions of employment of the stockers. As Graber testified, the moldings "are difficult to administer," and the employees "just wanted to know if there was any other method that we could use." Similarly, when an employee representative asked, "Can we get rid of the J-hooks?," he did so because the J-hooks made stocking more difficult, and he was proposing to do away with them.

The employee representatives were making proposals for change every time they asked such "can we" questions. All of the quoted "can we," or "could," or "will Dillon's," or "will there be" questions were proposals to change the terms and conditions of employment of the employees. Examples are: "Could we have paper seat covers in our rest rooms for sanitary reasons?"; "Could store #56 get safety goggles for associates who use the fryer in the bakery and associates who operate the bailer?"; "Could the company look at 100% on sick pay and pay associates for unused sick leave?"; "Could the associates in charge of the store at night be considered for more pay?"; "Could the store schedule an extra person in case someone calls in sick?"; "Could we have" C.P.R. training?; "Could better lighting" be installed?; "Could" the nonsupervisory department heads be more involved in evaluations?; "Could the company look at" giving flu shots?; "Can anything be done to improve the air conditioning the front end area at store #24?"; "Can anything be done about" the discomforts of the smoking-room?; "Can we have plastic bag holders on top of the check

stands?"; "Will there be a cost-of-living wage increase?"; "Will the company provide" a gym?; "Would it be possible to" make a change in sick-pay policy?; and, "Will the company be getting into providing day care service?" All of these proposals were phrased as questions. Of course, being an entity that exists solely at Respondent's sufferance, as Graber acknowledged, the Associates' Committee was hardly in a position to make table-pounding demands.

The first subject of "dealing" that is listed in Section 2(5) is grievances. The reports of the Associates' Committee meetings also include several accounts of grievance being entertained by Respondent. One statement was, "Sundays and nights are not being rotated fairly"; that statement was a grievance over the rotation of undesirable shifts; there is no other honest interpretation. Topics of other grievances that were entertained included: an employee's being charged an extra vacation day; premium pay not being paid as promised; an employee's not being allowed time off for sports; employees' being required to search for replacements while off sick; damaged clothes from new knives; unpleasant working conditions such as dirty breakrooms, heat, and odors; and failure to notify employees of crimes on the premises. Therefore, the Associates' Committee existed for the purposes of presenting grievances to Respondent, as well as proposals.

And some of the grievances and proposals were granted. The answers to just one set of questions and comments included: "we will fix" the towel dispensers; "management was notified and will follow up" on the weekend rotation complaint; "we will have it [the plumbing] repaired"; and "yes," goggles will be provided for fryer and bailer operators. Other "we will" answers promised action on proposals and grievances involving topics such as air conditioning; bag holders; odor-suppressors; labeling of circuit breakers; and a table in a smoking lounge. When the employees complained about the cleanliness of break areas, Koelliker visited the store managers to remind them to see that the areas were kept clean. In one case, action was not only taken on a grievance, the Associates' Committee was told how future grievances should be handled; at the September 28 Associates' Committee meeting, the members were told (in response to question 38) that future grievances should go through the store manager, then to Koelliker or Schumacher; additionally, Schumacher went to the store manager involved on the grievance and reminded him of the correct policy, thus giving remedy to the specific grievance at hand. Many other proposals and grievances were answered by stating that the matters were under consideration.

Graber, Koelliker, and Schumacher acknowledged that many of the questions and comments that were voiced by the employee representatives were "suggestions," if not proposals, or "concerns," if not grievances. But the Associates' Committee did present grievances and proposals. And those proposals and grievances were entertained, and they were responded to, if not granted. This could not have happened if the Associates' Committee did not have as a purpose, "dealing" with Respondent. As stated in *Electromation*: "Purpose is a matter of what the organization is set up to do, and that may be shown what the organization actually does."⁶ This point also renders irrelevant certain testimony by Schumacher and other of Respondent's witnesses about how

⁶ 309 NLRB at 996.

they “view” conduct of the Associates’ Committee. (And see *Electromation*, supra at fn. 27.)

In summary, most, if not all, of the employee representatives’ proposals and grievances concerned the employees’ terms and conditions of employment; those proposals and grievances had been advanced collectively, on a representational basis; and Respondent did entertain those proposals and grievances. In doing so, Respondent engaged in “dealing” with the Associates’ Committee. The Associates’ Committee was, therefore, a labor organization under Section 2(5), as I find and conclude.⁷

2. Domination, interference, and support

Respondent does not dispute that it initiated all meetings of the Associates’ Committee; it determined the committee’s structure and functions; at least in part, it determined which employees would serve as representatives; it determined the terms of office of the representative; it determined election dates and times; it provided election notices, ballots, ballot boxes, and tally facilities; it determined election procedures; and it paid employee representatives for their time spent at meetings and preparing for meetings.⁸

I have previously concluded that the Associates’ Committee is a labor organization within Section 2(5); I further find and conclude that Respondent has violated Section 8(a)(2) of the Act by dominating and interfering with, and contributing support to, that labor organization.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Dillon Stores, a Division of Dillon Companies, Inc., Wichita, Newton, and Wellington, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dominating or interfering with the formation or administration of the Associates’ Committee or any other labor organization, or contributing financial or other support to the Associates’ Committee or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately disestablish the Associates’ Committee and cease interfering with the formation or administration of,

⁷ Respondent cites several cases in which dealings on terms and conditions of employments were not conducted; in this case, little other than such dealings was conducted.

⁸ The payment of wages is not excused by the proviso of Sec. 8(a)(2) because the payments were made in furtherance of Respondent’s other unlawful acts of interference and domination. See *Electromation*, 309 NLRB at fn. 31.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

or contributing financial or other support to, the Associates’ Committee or any other labor organization.

(b) Post at its Wichita, Newton, and Wellington, Kansas facilities copies of the attached notice marked “Appendix.”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives you these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives that you choose

To act together for other mutual aid or protection

To choose not to engage in such protected concerted activities.

WE WILL NOT dominate or interfere with the formation or administration of the Associates’ Committee or any other labor organization, and WE WILL NOT contribute financial or other support to the Associates’ Committee or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL immediately disestablish the Associates’ Committee and cease interfering with the formation or administration of, and cease contributing financial or other support to, the Associates’ Committee or any other labor organization.

DILLON STORES, A DIVISION OF DILLON COMPANIES, INC.